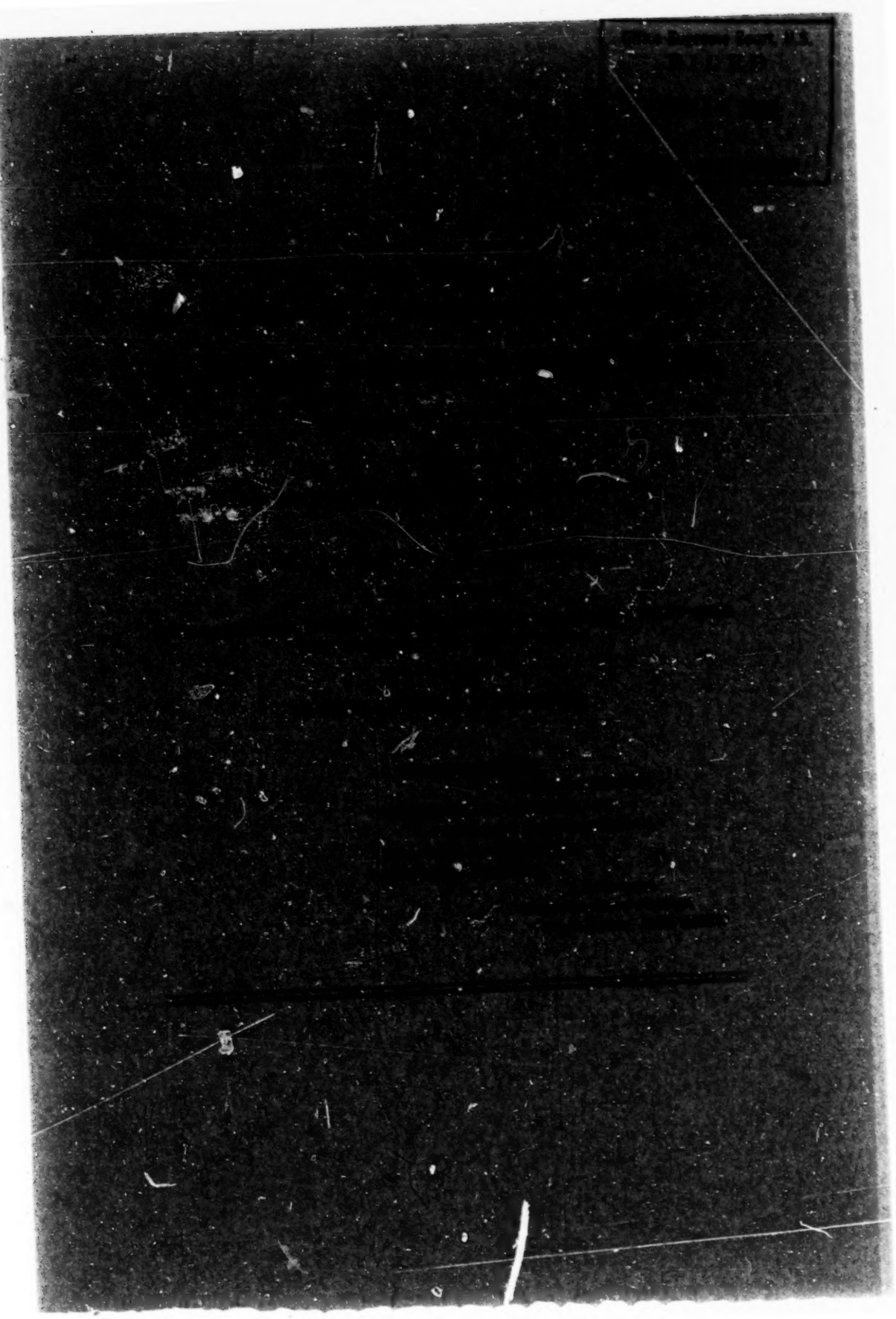

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

CONTINENTAL OIL COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court granted appellee's motion for summary judgment without an opinion or findings of fact and conclusions of law, but advised counsel of its intention to enter summary judgment by letter, as set forth in the Statement, *infra*, p. 8.

JURISDICTION

The judgment of the district court entering summary judgment and dismissing the complaint as to defendants, Continental Oil Co. and Hondo Oil and Gas Co., was entered on September 27, 1963 (Appendix, *infra*, pp. 22–23). The United States filed a notice of appeal from the dismissal of the complaint

as to Continental Oil Co. on November 26, 1963. The jurisdiction of the Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Diebold, Inc.*, 369 U.S. 654; *United States* v. *du Pont & Co.*, 353 U.S. 586.

QUESTION PRESENTED

Whether the district court improperly granted summary judgment dismissing the government's complaint charging that an acquisition of corporate assets violated Section 7 of the Clayton Act, where the court made no findings and rendered no opinion and the following issues were in dispute: (1) whether the State of New Mexico constituted a relevant submarket; (2) whether the two companies were in competition prior to the acquisition; (3) whether the acquiring company had engaged in anticompetitive conduct following the acquisition; and (4) whether there were mitigating circumstances which justified the acquisition.

STATUTE AND RULE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the

country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Rule 56(c) of the Federal Rules of Civil Procedure, as amended July 1, 1963, provides in pertinent part:

> SUMMARY JUDGMENT.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

STATEMENT

1. THE AMENDED COMPLAINT

On October 23, 1961, the United States filed an amended complaint against Continental Oil Company alleging that Continental's acquisition of certain assets of Malco Refineries, Inc., was unlawful under Section 7 of the Clayton Act.[1] The transaction in question is the lease by Continental of Malco's refinery at Artesia, New Mexico, for a period of twenty

[1] Hondo Oil and Gas Co. (the name adopted by Malco after the acquisition) was also named a defendant. The United States' original complaint had named Continental as the sole defendant. On September 18, 1961, the district court, on motion by Continental, ordered that Hondo be made a party and that the government amend its complaint accordingly.

years for a total consideration of $7,450,000 [2] and with an option to Continental to purchase the refinery at the end of the term for $100,000. In addition, Continental purchased Malco's crude oil pipeline and gathering facilities, its marketing facilities and the trade name "Malco" (Amended Complaint, par. 23).

The complaint alleged that at the time of the acquisition on May 1, 1959, Continental was a major integrated oil company engaged in the purchasing, production and refining of crude oil, as well as the distribution and marketing of refined petroleum products in twenty-six states in the mid-continent areas of the United States; that Continental owned one of seven crude oil refineries in New Mexico and accounted for approximately 13 percent of the State's refining capacity; that Continental sold nearly 10 percent of the gasoline consumed in New Mexico; and that substantially all such gasoline was marketed at "major brand" retail prices under the name "Conoco" through 233 service stations owned or leased by or under contract to Continental. (Amended Complaint, pars. 4–10, 14–17).

Malco was an independent oil company engaged in the purchasing, production and refining of crude oil and in the distribution and marketing of refined oil. The complaint alleged that its Artesia, New Mexico, refinery, acquired by Continental, constituted 40 percent of the State's refinery capacity; that gasoline produced at the refinery was marketed primarily in

[2] Exh. No. 1 to motion of Continental Oil Co. to add Hondo Oil and Gas Co. as a Party defendant, p. 3. (filed Aug. 7, 1961).

New Mexico and constituted 11.5 percent of the total gasoline consumed in the State; that Malco sold its gasoline to jobbers and distributors at prices below those charged by the major oil companies; that these jobbers in turn sold to so-called "cut-rate" service stations, including 200 stations selling under the name of "Malco," which sold at prices 2 cents below the prices charged by the major oil companies; and that the jobbers, distributors and 200 service stations "depended upon Malco as a source of supply of gasoline to enable them to continue in business and to compete with distributors and service stations handling gasoline under the brand names of major oil companies" (Amended Complaint, pars. 11–13, 14, 18–21).

The complaint alleged, *inter alia*, that as a result of the acquisition the largest supplier of "cut price" gasoline in New Mexico was eliminated, that Continental increased its relative share of the New Mexico market for the sale of gasoline from 10 percent to 20 percent and that there was an undue increase in concentration of the supply and marketing of gasoline in the hands of the major integrated oil companies. The effect of this, it was charged, was the actual or potential elimination of competition between the companies in the wholesale and retail marketing of gasoline in New Mexico (Amended Complaint, par. 23).

2. THE ANSWER

Continental's answer admitted certain facts relevant to the description of the two companies and their production and marketing activities. However, it denied the major part of the government's allegations, in-

cluding the charge that the acquisition would tend substantially to lessen competition. In its defense, Continental alleged, *inter alia,* that New Mexico does not constitute a gasoline marketing area (pars. 15, 18), that there was no substantial competition in New Mexico in the marketing of "Conoco" and "Malco" gasoline (pars. 16, 17), and that the competitive positions of the two companies justified the acquisition (Second Defense).

3. PRETRIAL PROCEEDINGS

In discovery proceedings, the government served two sets of interrogatories on Continental calling for factual information and documents and took nearly 750 pages of testimony in the deposition of eight Malco and Continental officials. The parties stipulated facts dealing with such matters as the financial status of both companies and the location of their retail outlets, and identified and authenticated documents (reserving various objections).

In a pretrial order issued July 17, 1963, the court defined the relevant geographic market area to include New Mexico, El Paso County, Texas, and the eastern half of Arizona, but specifically provided that the government "is not precluded from offering evidence on the trial of a sub-market area as contended by [it]." The order also established a time schedule for motions for summary judgment and trial.

4. CONTINENTAL'S MOTION FOR SUMMARY JUDGMENT

Based upon "the record on the pre-trial hearing and the pre-trial order, the pleadings, the stipulation of

facts entered into by the parties, the answers to interrogatories, the oral depositions and all documents referred to in the stipulations as to documents," Continental filed a motion for summary judgment contending that there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law. In support of its motion Continental submitted a 44-page brief and a 111-page appendix, in which it argued, *inter alia,* (1) that the nature and purpose of the agreement was such as to show that the acquisition did not have any anticompetitive effects; (2) that the increase in Continental's share of the refining capacity in the relevant market was *de minimis;* (3) that there was no substantial competition between Continental and Malco before the acquisition, and that whatever competition may have existed between them or their respective customers has continued and is assured for the future because Continental has continued to conduct the business of its Malco subsidiary in the same manner as Malco had conducted it when it was an independent company; and finally, (4) that its acquisition of Malco had intensified rather than diminished competition.

5. GOVERNMENT'S OPPOSITION TO THE MOTION

The government filed a detailed brief in opposition to the motion and submitted affidavits by an economist, two gasoline distributors and two attorneys (Chamberlain Aff.; Lake Aff.; Gaffey Aff.; O'Reilly Aff.; and Somerville Aff.) controverting factual allegations made by Continental. The major issues in dis-

pute between the parties are discussed below (infra, pp. 9–17).

6. THE DISTRICT COURT'S DECISION

Final argument on Continental's motion was set for September 4, 1963, but on August 26, 1963, the court vacated the order for hearing. The court then sent counsel the following letter on September 24, 1963:

> After a study of the pleadings, stipulations and exhibits, together with the very comprehensive briefs filed by both the Government and the defendants, the Court is constrained to grant the defendants' Motion for Summary Judgment.
>
> It may well be that there remains in the case certain disputed issues of fact, but I do not feel that they are material, and even if found in the Plaintiff's favor, it would avail them nothing.

On September 27, 1963, the court (the late Judge Waldo H. Rogers) entered its order granting summary judgment and dismissing the amended complaint. The court did not enter findings of fact and conclusions of law nor did it write an opinion, although its order and judgment did state "that there is no genuine issue as to any material fact and the defendants are entitled to a judgment as a matter of law."

THE QUESTION IS SUBSTANTIAL

This appeal presents an instance of a clear misapplication of the summary judgment procedure to a complicated antitrust case arising under Section 7

of the Clayton Act. On Continental's motion for summary judgment, there were four factual issues in genuine dispute. If the court resolved these disputed issues in favor of the party opposing the motion, as it was required to do, *Poller* v. *Columbia Broadcasting,* 368 U.S. 464, 473, then it is clear that the acquisition is prohibited by Section 7. *United States* v. *Philadelphia National Bank,* 374 U.S. 321; *Brown Shoe Co.* v. *United States,* 370 U.S. 294. Accordingly, the district court was required to deny the motion and afford the government an opportunity to prove its contentions at a trial. Rule 56(c), F.R. Civ. P.

1. The issues in dispute were as follows:

a. *Whether the State of New Mexico is a relevant submarket in which to view the competitive effects of the acquisition.*—A necessary step in determining whether an acquisition violates Section 7 is the determination of the relevant market in which to view the effects. *United States* v. *du Pont & Co.,* 353 U.S. 586, 593; *Brown Shoe Co.* v. *United States,* 370 U.S. 294. The government's complaint charged that New Mexico formed a relevant market and Continental denied the contention in its answer. On summary judgment Continental's presentation was based solely on the larger relevant market as defined by the court's pretrial order. It did not demonstrate that there were no relevant submarkets or deal with the effect of the acquisition in such areas.

Pursuant to the pretrial order, which left it open to the government to offer "evidence on trial of a sub-

market area as contended by [it]," the government, by affidavit and in its brief, presented data to show that New Mexico by itself was a relevant submarket. It is the fifth largest state in area (App. 27, note 14)[3] and consumed 408,582,000 gallons of gasoline in 1961 (First Stip., par 1). Both companies considered New Mexico a distinct market; indeed, the principal reason urged by Continental officials for acquiring the Malco refinery was that it would guarantee a supply for the New Mexico market (I.D. 18, 21, 43, 47, 58, and 59; Lackey Dep. 50–51). Both companies owned and operated refineries in Artesia, New Mexico (First Stip., par 2(a)). In 1958 Continental supplied about 58 percent of its requirements of gasoline for New Mexico from its Artesia refinery (First Stip., pars. 8, 9). Similarly, about 72 percent of Malco's sales were made in New Mexico (Gaffey Aff., p. 4, table 1). New Mexico may be distinguished from the rest of the market defined by the court by the fact that, to a major extent, it is supplied by different sources of supply than are Arizona and El Paso County, Texas (Govt. Br. p. 17; First Stip., pars. 2(a), (b), and 3(a), (b)).

[3] Citation is to the appendix to the brief submitted by Continental Oil Co. in support of its motion for summary judgment. "Con. Br." refers to its brief in support of the motion. Other material in the record filed with the Clerk of the Court is cited as follows: The affidavits filed by the government in opposition to Continental's motion for summary judgment are cited as "Aff." preceded by the name of the affiant. "Stip." refers to the stipulations entered into by the parties. "I.D." refers to the documents identified by number in "The Second Stipulation as to Certain Documents" and "Dep." refers to the transcript of the depositions taken.

b. Whether Continental and Malco were in competition prior to the acquisition.—The existence and extent of competition between the acquiring and acquired companies is obviously a material fact in determining whether the acquisition may tend substantially to lessen competition. *Brown Shoe Co.* v. *United States, supra,* at 335. Continental contended that it did not compete with Malco before the acquisition. Its basic contention was that it catered to one class of trade while Malco catered to another (Con. Br. pp. 33–34): that Malco's output was sold from its refinery to wholesale distributors or chain operators in large lots (the "tank car" level) while Continental sold chiefly to service stations (the "tank wagon" level) and that the "tank wagon" market is entirely different from the "tank car" market (Con. Br. p. 31). Although both companies did sell at the "tank wagon" level, Continental contended that they did not compete at this level because Continental sold only to franchised "Conoco" brand jobbers, whereas Malco sold only to independent or unfranchised distributors (Con. Br. p. 32). It also contended that the two companies did not compete at the retail level since the retail gasoline stations selling gasoline produced by Malco were independent operators over whom Malco had no control (Con. Br. p. 33), and that in any event "comparatively few retail outlets selling under the brand names of 'Conoco' and 'Malco' were close enough together to compete with one another" (Con. Br. p. 33). Continental urged the court to "take judicial notice, based on personal observation, of this fact

of life in the retailing end of the oil business" (App. 79).

The government contested Continental's assertions that it did not compete with Malco before the acquisition. Both companies sold or exchanged substantial amounts of gasoline to other refiners. In 1958 such sales by Malco exceeded twenty-two million gallons, and comparable sales and exchanges by Continental were in excess of ten million gallons. Both companies considered themselves in competition with each other at the retail level (Lackey Dep. 140–141; Copple Dep. 33; Liddell Dep. 36–37). J. W. Liddell, a Continental vice president, testified that independent stations compete with "Conoco" stations and that price cutting causes customers to shift from one to the other. Other deponents emphasized that if the traditional price margins between independents and major brands are widened or narrowed there is consumer reaction to such price changes (Liddell Dep. 37; Copple Dep. 40–41; Swanson Dep. 24–25; Frost Dep. 22–23).

The government also disputed the defense claim that the "Malco" and "Conoco" stations were not near enough to one another to compete. There were 34 places in New Mexico where both Conoco and Malco gasoline were sold at retail. 52.1 percent of "Conoco" retail outlets in New Mexico were in towns or cities having "Malco" outlets and 78.2 percent of the "Malco" retail outlets were in towns or cities also having "Conoco" stations. In Albuquerque alone, there were 56 Conoco and 16 Malco stations at the time of the acquisition. Similarly, in Roswell, New

Mexico, there were 10 Conoco stations and 7 Malco; in Artesia, 3 Conoco and 6 Malco; in Carlsbad, 6 Conoco and 7 Malco; in Las Cruces, 9 Conoco and 2 Malco; and in Gallup, 4 Conoco and 5 Malco stations (First Stip., par. 17).

c. Whether Continental engaged in anticompetitive conduct with respect to Malco's customers after the acquisition.—Another issue in dispute between the parties was whether Continental used the acquisition of Malco to enable it to engage in anticompetitive conduct, and whether competition between the two companies and the dealers in the companies' products had in fact been restricted following the acquisition.

Continental maintained that any competition which may have existed between it and Malco or between their respective customers has continued (Con. Br. p. 33); and that it instructed Malco's personnel to continue operating Malco separately and independently of Continental (Con. Br. p. 35). Continental claimed, in conclusion, that "the agreed facts establish that Continental has continued to supply substantially the same customers and on the same basis * * *. The documentary evidence and the undisputed testimony establish that Continental desired to retain Malco's markets and to continue to supply the same jobber-distributor customers" (Con. Br. p. 35).

Those contentions were directly disputed by the government which submitted affidavits to show that Continental exercised control over Malco officers and instructed them to limit competition between Malco stations and the major brand gasoline stations (Chamberlain Aff.; O'Reilly Aff.; Somerville Aff.).

Continental's officers testified in their depositions that the company's policy was to eliminate sales to "rebranders" (stations which purchase gasoline and then sell it under their own name), and Malco's president testified that he urged Malco's jobbers not to sell to rebranders (Copple Dep. 47, 80–81).

The affidavit of Cletus Chamberlain, an independent distributor of Malco products, stated that "[s]ince the acquisition, Continental has dictated the policies and practices of Malco Products, Inc., and has exercised control of [Chamberlain's] pricing and marketing policies" (Chamberlain Aff. 2). Malco's officers, on instruction from Continental, threatened to raise the price of gasoline to Chamberlain if he did not eliminate rebrand accounts (Chamberlain Aff. 2–3). He was forced to cut the traditional two-cent differential between "Malco" and major "branded" gasoline to only one cent, and to discontinue sales to three companies which operated discount stations but which refused to abide by Malco's new one-cent discount policy (Chamberlain Aff. 3–4).

The government showed further that after the acquisition Malco told one owner of a gasoline marketing firm that it would no longer sell him gasoline (O'Reilly Aff. 1). Another individual who had been marketing gasoline in New Mexico for about 15 years regularly purchased substantial quantities of gasoline from Malco both before and after the acquisition. However, after his company was awarded, on competitive bids, a contract to supply a municipal corporation with gasoline for several years, Malco re-

fused to sell gasoline and has refused to sell to him ever since (O'Reilly Aff. 2–3). Still another distributor related that, after the acquisitions, Malco officials told him not to sell to rebrand accounts and tried to dictate his pricing policies (Somerville Aff. 3).[4]

d. Whether there were mitigating circumstances which justified the acquisition, even if anticompetitive.—Finally, Continental asserted that the acquisition was justified by economic necessity generated by competitive threats to both companies. It showed that Malco had suffered a decline in its market position between 1955 and 1958. This decline was caused by construction of products pipelines into New Mexico and Arizona which resulted in Malco's competitors having a lower cost for their gasoline, and by the entry into the market of new competitors which sold both branded gasoline and cut-rate unbranded gasoline (Con. Br. p. 40). From these factors Continental concluded that "[i]t is apparent that if Mr. Anderson [Malco's president] had not leased his refinery to Continental, he would have been forced to have closed it and the jobber-customers would have lost their source of supply" (Con. Br. p. 43). Continental also

[4] These statements were included in affidavits submitted by government counsel and represent evidence which the government would offer at trial. Government counsel advised the court that the individuals making the statements were reluctant to furnish affidavits because they feared retaliation. (O'Reilly Aff. 2, 3). Their testimony could, of course, be compelled at trial. Rule 56(f), F.R. Civ. P., indicates the inappropriateness of summary judgment in these circumstances. See also Advisory Committee's note to amend Rule 56, H. Doc. 67, 88th Cong., 1st Sess., p. 45.

contended that it had sustained drastic reductions in its share of the market, that its refinery at Artesia was antiquated and that it was faced with the alternative of obtaining a new source of supply or pulling out of the New Mexico market (App. 46).

Even aside from the fact that these assertions do not bring Continental within a failing company defense, *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 302, the government disputed certain of the facts as well as the inferences drawn from them, thus necessitating a trial. *United States* v. *Diebold, Inc.,* 369 U.S. 654. There was no allegation that Malco was insolvent or deeply in debt. The company had a satisfactory supply of crude oil and a network of pipelines to gather this supply for delivery to its refinery at Artesia (Lackey Dep. 13–21). Its Artesia refinery was the largest and one of the most modern in New Mexico (First Stip., par. 2a; Lackey Dep. 14–15). It had always made a profit despite price wars (First Stip., par. 20). While the government conceded that Malco may have needed a products pipeline in order to compete most effectively (Gov. Br. pp. 65–66), it disputed Continental's assertions that Malco could not have built such a pipeline. An engineering study made for the company concluded that such a project was entirely feasible (Con. Exh. 1 to Anderson and Lackey Dep.) and Mr. Anderson, Malco's president, testified that the company would have built such a pipeline had the company retained its refinery (Anderson Dep. 32).

The government conceded that Continental was faced with a supply problem because its principal

source of supply to the relevant market was its small, obsolete refinery at Artesia. However, Continental was a prosperous company with total assets of $700 million (Third Stip., par. 3) and net earnings of over $60,000,000 in 1959. It had the financial resources to build another refinery to meet its needs either at Artesia or at another location (App. 44, 64).

2. Viewed in the light most favorable to the government, this record establishes that Continental's acquisition of the Malco refinery and certain other assets has had or will have the following adverse effects upon competition. First, the acquisition accomplished a sizeable increase in the concentration of the New Mexico market gasoline. Continental, an integrated oil company accounting for 12.32 percent of the New Mexico market, eliminated Malco, an independent accounting for 12.08 percent of the market, giving it a combined figure of over 24 percent of the gasoline consumed (Gaffey Aff., table 2). This market was already a highly concentrated one with two suppliers accounting for 28 percent of all taxed sales [5] and the top five accounting for 58 percent (Gaffey Aff., table 5). After the acquisition, Continental on a projected basis, would account for 17 percent of taxed sales (moving from fourth to second); and the two leading companies would account for 34 percent of taxed sales; while the top five would account for 65 percent. The

[5] There are two sets of figures in the record: one being all taxed sales and sales to non-refiners; the other being gasoline consumed. One set is used here in stating the approximate share of the market held by each of the leading companies (taxed sales), while the other set shows Continental's and Malco's shares of total sales of gasoline consumed with more precision, but does not reveal the shares of other sellers.

increase in concentration by the two leading firms would be almost 21 percent, while the top five would achieve an increase in concentration of about 12 percent.

Second, the acquisition eliminated a major independent source of supply to independent gasoline marketers who sell at discount prices. The independent was taken over by a major gasoline company whose policy had always been to sell at the higher "branded" price level.

Third, following the acquisition, Continental caused Malco's jobbers to cut off sales to "rebranders" and to customers who would not increase their prices to a one-cent differential below the price charged by the major oil companies. Continental also caused other customers to be concerned over their source of supply of cut-price gasoline, and cut off a jobber who won a competitive bid for a long term gasoline supply contract. See, *supra*, pp. 13–15.

Fourth, the acquisition eliminated substantial competition between Continental and Malco in sales of gasoline to other refineries, in sales to jobbers and distributors and at the retail level where cut-price Malco stations throughout the State of New Mexico competed with nearby stations selling "Conoco" gasoline at higher prices.

The district court was required to accept these factual contentions of the government as true in determining whether Continental was entitled to summary judgment. *Poller* v. *Columbia Broadcasting*, 368 U.S. 464, 473. On this assumption, it is beyond question that the acquisition is proscribed by Section 7.

United States v. *Philadelphia National Bank*, 374 U.S. 321; *Brown Shoe Co.* v. *United States*, 370 U.S. 294. Nor could the acquisition be justified by the economic and competitive difficulties which, according to Continental, faced the two companies. Moreover, according to the government's evidence, each was capable of surmounting any physical handicaps (Malco's lack of a pipeline and Continental's antiquated refinery) without the acquisition. See, *supra*, pp. 15–17.

3. The government recognizes that Continental disputes these contentions and the facts upon which they rest. This, however, merely emphasizes that Continental's motion for summary judgment should have been denied. *Poller* v. *Columbia Broadcasting*, 368 U.S. 464, 467. Just last term in *White Motor Co.* v. *United States*, 372 U.S. 253, 264, this Court warned that to decide "whether a particular merger will tend 'substantially to lessen competition' * * * a trial rather than the use of summary judgment is normally necessary. *United States* v. *Diebold, Inc.*, 369 U.S. 654."

In granting summary judgment on this incomplete and contested record, presenting involved and complicated issues of fact and law, the district court effectively denied the government its day in court, barred it from developing its case and kept it from tendering its proof and challenging the proof of the defendants. *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620. Indeed, this Court has many times pointed out that while summary judgment may be a salutary procedure in cases where issues are clear cut and simple, it

"presents a treacherous record for deciding issues of far flung import." *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 257.[6] While the disputed issues might be characterized as either issues of fact or mixed questions of law and fact, the Court need not attempt to distinguish between the two, for their resolution depends upon a choice of inferences to be drawn from certain underlying specific facts—which requires that a full trial be held. *United States* v. *Diebold, Inc.*, 369 U.S. 654; *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711.

4. The action of the district court is objectionable on still a further ground. The court rendered no opinion and entered neither findings of fact nor conclusions of law. Except for what is essentially a restatement of the words of Rule 56(c), the basis of its judgment is unexplained. Thus, this Court has no way of knowing what issues of fact the district court found to be in dispute but held immaterial (see Statement, *supra*, p. 8). The case presented literally hundreds of disputed facts bearing on the interrelated legal issues. To attempt to determine how the dis-

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[6] See *White Motor Co.* v. *United States*, *supra*, at 264; *United States* v. *Bethlehem Steel Corp.*, 157 F. Supp. 877, 879. As the Court stated in *Kennedy* v. *Silas Mason Co.*, *supra*, at 256, 257: "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine. * * *

"We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. * * *"

trict court may have resolved these disputes and what law it applied to the facts would be a difficult task even after a trial. To attempt to do so now presents an impossible job of sorting through the voluminous documents, depositions and affidavits on which the contesting parties rely. Review in such a void is no review at all and affords an added reason why the judgment below should be reversed and a full trial ordered.

CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted.

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FEBRUARY 1964.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil No. 4763

UNITED STATES OF AMERICA, PLAINTIFF

v.

CONTINENTAL OIL COMPANY AND HONDO OIL AND GAS COMPANY, DEFENDANTS

ORDER AND JUDGMENT

The defendant Continental Oil Company having moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings, depositions and admissions on file in this action (including answers to interrogatories, stipulations of fact, stipulations as to documents and the exhibits), and the Court being fully advised by the very comprehensive briefs filed by both the plaintiff and the defendant Continental Oil Company, and the Court having determined that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law, it is

ORDERED that the motion of the defendant Continental Oil Company for summary judgment be, and the same hereby is, in all respects granted; and it is

ORDERED, ADJUDGED AND DECREED that the plaintiff have nothing by this action; that the Amended Complaint herein be, and the same hereby is, dismissed as

to both defendants; and that the defendants, Continental Oil Company and Hondo Oil and Gas Company, go hence without day.

Dated: September 27, 1963.

/s/ WALDO H. ROGERS
United States District Judge.

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